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Supreme Court of the United States

OCTOBER TERM, 1951

No. 264

DORA COLEMAN, *Appellant*,

v.

J. HOWARD MCGRATH, Attorney General of the United States,

and

A. R. MACKEY, Acting Commissioner of Immigration and Naturalization, *Appellees*.

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT

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A. R. MACKEY, Acting Commissioner of Immigration and Naturalization, *Appellees*.

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT

OPINION BELOW

The district court entered no opinion in this case. On March 20, 1951, it entered an order (R. 5) in which it stated its conclusion that the Act of October 16, 1918, as amended by the Act of June 28, 1940, was constitutional, and denied the appellant's motion for a preliminary injunction. Subsequently on June 18, 1951, the district court entered another order (R. 5-6) in which it reaffirmed its finding that the aforesaid act was constitutional, denied the appellant's motion for a preliminary injunction, dismissed the complaint and entered judgment for the appellees.

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, sec. 1253. Probable jurisdiction was noted on October 8, 1951.

STATUTE INVOLVED

Prior to 1940, the Act of October 16, 1918 (8 U. S. Code, sec. 137) provided, *inter alia* for the exclusion and deportation of aliens who were currently members of organizations advocating or distributing literature advocating the overthrow of the Government by force and violence. *Kessler* v. *Strecker*, 307 U. S. 22.

Section 23 (b) of the Alien Registration Act of 1940 (54 Stat. 673), amended Section 2 of the Act of October 16, 1918 (40 Stat. 1012, 41 Stat. 1008, 8 U. S. Code sec. 137 (g)) (1942 ed.) to read as follows:

> Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in Section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported.

STATEMENT OF THE CASE

The facts alleged in appellant's complaint and as shown by her immigration file, which was made a part of the record, are undisputed. These show the following:

The appellant is an alien 50 years of age, who was lawfully admitted to the United States for permanent residence on March 6, 1914. She was thirteen years of age at the time. She has continuously resided in the United States since that date. She is married to a citizen and resident of the United States and is the mother of three children, born and residing in and citizens of the United States. (R. 1, 13, 21).

On May 2, 1950, the appellant was ordered deported pursuant to the provisions of 8 U. S. Code sec. 137 (g)

1942 ed.) as amended on June 28, 1940, for past membership in the Communist Party, which the Immigration Service found to be an organization that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States, and that circulates, distributes and displays, and causes to be circulated, distributed, and displayed, and that has in its possession for the purpose of circulation, distribution, issue and display, written and printed matter so advocating and teaching. (R. 2, 13-14, 19-21).

The findings of the Immigration Service, upon which the deportation order was based, rested solely upon the testimony of the appellant as to her membership and activities in the Communist Party (R. 10-12), and certain documentary evidence which was introduced to show the character of the Communist Party (R. 22).

The appellant's testimony shows that she joined the Communist Party for a brief period in 1919, but quit in 1920 when she moved from Philadelphia to New York, that she rejoined again in 1928 remaining a member for about two years, rejoined again in 1936, and remained a member for almost a year and a half until some time in 1938. (R. 11-12).

The appellant joined the Communist Party because she understood it to be an organization that was fighting for justice and democracy and the rights of workers (R. 11), for equal rights for minority races, for better working conditions and wages (Tr. 12, 13, 47, 53).[1] She was never an active member and never took an oath to uphold the aims and principles of the Communist Party (R. 11, Tr. 13).

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[1] The notation Tr. refers to the transcript of the hearing before the Immigration Service, only portions of which are included in the printed record, but which, by stipulation, may be referred to by either side. (R. 26).

The appellant never knew that the Communist Party advocated the overthrow of the government by force and violence, and never heard any one so advocate (R. 12, Tr, 14, 20-21, 82). The appellant does not and never did believe in the overthrow of the government by force and violence (R. 12, Tr. 22, 82).

She never attended a Communist Party school (R. 12), and most significantly never even read the documents and literature which were introduced to show the character of the Communist Party and upon which the deportation order is based (Tr. 48-52).

Thus the deportation order rests solely on a finding of mere past membership in a proscribed organization, which membership ended two years before the enactment of the statute authorizing deportation and twelve years before the order of deportation.

The Immigration Service considered the appellant's own activities, beliefs, or advocacy to be completely irrelevant. And, according to the Service, equally without significance was the fact that the appellant never participated in the proscribed activities attributed to the Communist Party, never had any knowledge that it was an organization which advocated the overthrow of the government, and indeed never even read the exhibits upon which the appellees based their conclusion that the Communist Party was of such a character. According to the Immigration Service, since the appellant admitted past membership in the Communist Party, "the only issue in this case is, therefore, whether . . . the Communist Party of the United States, during the period of the respondent's membership therein, was an organization coming within the purview of the deportation statute" (R. 14, 21).

A warrant of arrest was first issued against the appellant by the Immigration and Naturalization Service on April 12, 1946, and was served on her on May 10, 1946. A

preliminary investigation was held on June 25, 1946[2] but the actual hearing upon which the deportation order was rested was held on July 26 and 27, 1949,[3] and the charges upon which the order is based were not lodged against the appellant until the second day of the hearing. It is conceded that, as alleged in the complaint, the hearings were not conducted in accordance with the requirements of the Administrative Procedure Act, (R. 2, 3, 8, 9, 17, 22).

Subsequent to the issuance of the order of deportation, the appellant filed a complaint in the United States District Court for the District of Columbia seeking to enjoin the appellees from deporting her.

The complaint alleged that the statute involved both on its face and as construed and applied to her was unconstitutional as in conflict with Article 1, Section 9, and the First and Fifth Amendments of the Constitution. It further alleged that her deportation proceeding had not been conducted in conformance with the Administrative Procedure Act, 5 U. S. Code, secs. 1001 et seq., and had denied her due process of law. The complaint prayed for both a preliminary and a permanent injunction. (R. 1-4).

A statutory three-judge court was convened pursuant to 28 U. S. Code, sec. 2282. The case was consolidated for the purpose of hearing with the companion case of *Mascitti* v. *McGrath* (No. 206 in this Court), in which the plaintiff challenged the constitutionality of the same statute and sought the same relief as the appellant herein.

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[2] It is not clear what purpose the preliminary investigation served, but its only apparent purpose would be to determine whether deportation proceedings should be instituted. No effort was made at this stage to make out a case for deportation. The only witness examined was the appellant herself. There was only one immigration inspector present at the examination, and he was a different individual than either the presiding inspector or examining inspector who participated in the actual deportation hearings.

[3] The lapse of over three years between the service of the warrant of arrest and the deportation hearing was not due in any way to any action or request of the appellant.

On March 20, 1951, the three-judge district court entered an order in both of these cases finding that the statute challenged by the plaintiffs was constitutional, and on that ground denied the plaintiffs' motions for a preliminary injunction. The same order dissolved the three-judge court and remanded the case to United States District Judge Curran for the determination of other questions (R. 5).

Thereafter, the three-judge district court, on June 18, 1951, vacated and set aside its order of March 20, 1951, and reconvened the three-judge court. In the same order, the court below denied the appellant's motion for a preliminary injunction, dismissed the complaint, entered judgment for the appellees and again dissolved the three-judge court (R. 5-6).

No opinion was written in connection with either order.

SPECIFICATION OF ERRORS

The court below erred in failing to grant the appellant the relief prayed for in her complaint, in dismissing the complaint, and in entering judgment for the appellees because:

(a) The Act of October 16, 1918, as amended by the Act of June 28, 1940, 8 U. S. Code, sec. 137 (1942 ed.), is unconstitutional on its face and as applied to the appellant, since it is in conflict with Article I, Section 9 and the First and Fifth Amendments of the Constitution.

(b) The deportation proceeding upon which the deportation order is based was not conducted in conformance with the requirements of the Administrative Procedure Act and denied the appellant due process of law.

SUMMARY OF ARGUMENT

I

The basic premise underlying the statute is that the government possesses "plenary" power over aliens and so may deport them without regard to constitutional restric-

tions. But this Court has indicated that deportation is a punishment of the severest nature, and that as a consequence deportation statutes must meet the same constitutional standards as criminal statutes. Resident aliens are entitled to all the guarantees of the Constitution including the freedom of speech and press. It is the sheerest hypocrisy to urge that resident aliens enjoy the full protection of our constitutional guarantees, except that they may be deported without regard to the Constitution. The exclusion cases which have upheld the power of the government to exclude aliens without constitutional restrictions of any kind rest upon the doctrine that the Constitution has no extraterritorial application. Their doctrine cannot be applied to deportation proceedings. Accordingly, the present statute must fall if it comes in conflict with any of the provisions of the Constitution.

II

The statute as applied is in conflict with the *ex post facto* clause of the Constitution. The test for the applicability of the *ex post facto* clause is whether or not the challenged act is penal in nature not whether or not it is a criminal statute. The *ex post facto* clause applies to civil proceedings as well as criminal if some punishment or penalty is involved. Deportation statutes, although not technically criminal, inflict punishment and therefore come within the scope of the *ex post facto* clause.

The statute as applied to the appellant is *ex post facto*. It was passed after she terminated her membership in the Communist Party. It inflicts the punishment of deportation on her for conduct which occurred prior to the enactment of the statute, and nothing the appellant could do could alter the result.

III

The statute offends the First and Fifth Amendments. It requires the deportation of the appellant upon mere past

membership in a proscribed organization, although the proof shows that the appellant never at any time participated in or had any knowledge of the proscribed activities of that organization. Such conduct could not be punished criminally, and therefore cannot be punished by deportation. To punish the appellant for past membership in an organization, although innocent of its proscribed purposes, employs the unconstitutional technique of guilt by association.

Whether tested by the clear and present danger doctrine or the reasonable relation doctrine, the statute as applied does not meet the standards set by the Constitution. The appellant's continued presence in this country does not constitute a clear and present danger of any substantive evil. Nor does the order of deportation here bear any reasonable relationship to the purpose for which governmental power to deport exists, i. e., to expel undesirable aliens from the country. There is no rational basis to presume the character of the appellant solely on the basis of her past membership in the Communist Party when the proof shows that the appellant never participated in or had any knowledge of the alleged unlawful purposes of that organization, and indeed never even read the books and documents which, in the government's view, establish the unlawful nature of the Communist Party. The suggestion that nonetheless, the appellant may be deported because of the "administrative difficulties" of giving her a hearing on her own case, amounts to a denial of due process of law.

IV

The appellant's deportation proceeding failed to conform with the requirements of the Administrative Procedure Act. The government contends that under section 12 of the Act, it was not necessary to do so because the proceeding commenced prior to the effective date of the Act. But section 12 postponed the application of the Act only to afford agencies time to change their practices. The appellant's deportation hearing was held three

years after passage of the Act. The Immigration Service had ample opportunity to revise its practices prior to the hearing. It failed to do so not because of lack of time, but because it contended that it was entirely exempt from the provisions of the Act. Reliance on section 12 to support its position now is only an afterthought necessitated by this Court's rejection of this contention. The failure to conform with the requirements of the Administrative Procedure Act denied the appellant due process of law.

ARGUMENT

I. The Constitution Applies to Deportation Proceedings.

This case involves the power of Congress over the life and welfare of an alien lawfully admitted into this country for permanent residence, and who has spent all of her adult years as a resident of this country. There are over three million aliens in the same category as the appellant. *Statistical Abstract of the United States* (1950 U. S. Department of Commerce, Bureau of the Census) 43.

The appellant has lived here for 37 years. Her family, her ties, her only means of support, are in this country. To deport her would be to rob the remaining years of her life of any meaning or significance.[4] The basic premise underlying the position of the government is that the government may deal with aliens such as the appellant, as it wills, and that the guarantees of our constitution afford her no protection, or at best a very minimal protection. See op-

[4] At her deportation hearing, the appellant was asked by the presiding inspector whether she had anything to say. She replied:

> Except that I don't see why—I can't see any way that I would want to separate myself from my children. That is the only thing. I can't see how I could ever separate myself from my children. That is the only thing that bears on my mind, and that is the only thing I can think of. (Tr. 190).

position of government to petition for certiorari in *Harisiades* v. *Shaughnessy*, No. 43, this Term.[5]

Some support for the government's position can be found in earlier cases decided by the Court. This "plenary" power over aliens was expressed most sweepingly in *Fong Yue Ting* v. *United States*, 149 U. S. 698, decided in 1893, and which is most frequently cited in support of the government's position. The Court declared in that case:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. (p. 707)

In the view of the court in that case:

> The order of deportation is not a punishment for crime. . . It is but a method of enforcing the return to his own country of an alien who has not complied with the condition upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here should depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law. . . (p. 730).

Applying the above doctrines, the Court sustained a statute which required the deportation of a Chinese laborer under the following facts as stated by the Court: (703-704).

> On April 11, 1893, the petitioner applied to the collector of internal revenue for a certificate of resi-

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[5] Cf. Murphy, J. concurring in *Bridges* v. *Wixon*, 326 U.S. 135, 160:

> This assumption underlying the statute is that the "plenary" power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights.

> dence; the collector refused to give him a certificate on the ground that the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race and not creditable witnesses, and required of him to produce a witness other than a Chinaman [sic] to prove that he was entitled to the certificate, which he was unable to do, because there was no person other than one of the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain therein; and because of such unavoidable cause he was unable to produce a certificate of residence, and was now without one. The petitioner was arrested by the marshal, and taken before the judge; and clearly established to the satisfaction of the judge, that he was unable to procure a certificate of residence, by reason of the unavoidable cause aforesaid; and also established, to the judge's satisfaction, by the testimony of a Chinese resident of New York, that the petitioner was a resident of the United States at the time of the passage of the Act; but having failed to establish this fact clearly to the satisfaction of the court by at least one credible white witness, as required by the statute, the judge ordered the petitioner to be remanded to the custody of the marshal, and to be deported from the United States, as provided in the Act.

It is perfectly manifest that no such statute or procedure would be upheld by the Supreme Court today. Indeed, the basic doctrine of the case that no distinction can be made between a deportation proceeding and an exclusion proceeding would permit the government to deport aliens under the same procedure it employs to exclude without any notice or hearing and on the basis of secret evidence,[6] a proposition which even the government would not advance today.

The subsequent pronouncements of this Court, discussed below, on the nature of deportation proceedings and the

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[6] See *United States* v. *Shaughnessy*, 328 U. S. 537 (the Knauff case) which upholds the power of the government to exclude aliens without any of the rudiments of due process of law.

applicability of the Constitution to such proceedings clearly demonstrate that the *Fong Yue Ting* doctrine is not today a vital doctrine of constitutional law and that the case is only of historical interest to remind us of the barbaric fashion in which this country at one time treated Chinese immigrants.[7] Indeed, the case, viewed realistically, stands for the proposition that anything is permissible as far as Chinese laborers are concerned, a proposition clearly not applicable to the present case.[8]

The views of this Court today are certainly more in accord with those expressed by the dissenting judges in the *Fong Yue Ting* case and by Madison in commenting on the Alien Act of 1798:

> But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land is punish-

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[7] Cf. Brewer dissenting at p. 744:

> In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, why do they send missionaries here?

[8] The *Fong Yue Ting* case can be factually distinguished from the present since the court there found significance in the fact that the petitioners had failed to take any steps toward becoming citizens and indeed, being Chinese, were ineligible for naturalization under the statutes of that day (see pp. 707, 724). The appellant here is under no such bar and has applied for naturalization (R. 10). But obviously such a distinction fails to reach the heart of the case, and the subsequent decisions of this Court which have recognized the constitutional rights of resident aliens have made no distinction between those who have applied for citizenship and those who have not. Another available ground for distinguishing the case is the underlying premise of both the opinion and the statute it upheld that Chinese are different from other people and consequently may more readily be denied rights under our Constitution. But such a racist approach to constitutional rights is no longer sanctioned by this Court. Cf. *Oyama* v. *California*, 332 U. S. 633.

ment; and that often times most severe and cruel. (Brewer, J. in *Fong Yue Ting* at p. 740.)

. . . But it can never be admitted that the removal of aliens, authorized by the Act, is to be considered, not as punishment for an offense, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty, than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied (Madison, quoted by Field, J. dissenting in *Fong Yue Ting, supra*, at 748-749)

In *Yamataya* v. *Fisher*, 189 U. S. 86, the Court, although not expressly overruling the *Fong Yue Ting* case, held, contrary to the decision in that case, that an alien must be accorded due process of law in a deportation proceeding.

Subsequently, the Court said in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, that deportation may result "in loss of both property and life; or of all that makes life worth living." In *Bridges* v. *Wixon*, 326 U. S. 135, 154, the Court stated: "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." In *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391, it said: "Deportation can be the equivalent of banishment or exile . . . The stakes are indeed high and momentous for the alien who has acquired his residence here." In *Tan* v. *Phelan*, 333 U. S. 6, 10: ". . . deportation is a drastic measure and at times the equivalent of banishment or exile . . . It is the forfeiture for misconduct of a residence in this country.

Such a forfeiture is a penalty." And in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50: "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."*

And in the most recent case dealing with the nature and effect of deportation proceedings, this Court concluded that a deportation statute, because of its penal nature, must meet the same constitutional standards as a criminal statute. *Jordan* v. *DeGeorge*, 341 U. S. 223.

Logically, no other conclusion is permissible. It is unquestioned that resident aliens are entitled to all the guarantees of the Constitution, *Yick Wo* v. *Hopkins*, 118 U. S. 356, *Wong Wing* v. *United States*, 163 U. S. 228, *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, including the freedom of speech and press *Bridges* v. *California*, 314 U. S. 252. But it is the sheerest hypocrisy to say that resident aliens enjoy the full protection of our constitutional guarantees including the rights of free speech and free press, except that they may be deported for the exercise of these rights.

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*For similar expression by Circuit Courts of Appeal see *United States ex rel Klonis* v. *Davis* 13 F. (2d) 630 at 630: "Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as anyone borne of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone."; *Wallis* v. *Tecchio*, 63 F (2d) 250, 252: "The statute in its effect upon the individual must be classed as penal. . . We regard forfeiture for misconduct of the privilege of an existing residence in the United States as a penalty;" *Di Pasquale* v. *Karnuth*, 158 F. (2d) 878, 879: ". . . he had a vested interest in his residence . . . Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in the circumstances is not punishment."

Cf. 4 Blackstone's Commentaries 377: "Some punishments consist in exile or banishment, by abjuration of the realm or transportation."

Nor can a resident alien find substantial security or comfort in the proposition that while in the United States he will not be discriminated against because of his race, religion, or color, but that, nevertheless, he may be deported because he is Jewish, Negro, Catholic, or Chinese.

Neither logic nor history provides support for this doctrine of exceptionalism for deportation statutes, or for the contention that all powers of Congress are subject to the Bill of Rights, except the power to deport aliens. The Bill of Rights stand as affirmative restrictions on all of the powers of the federal government, *Jones v. Opelika*, 316 U. S. 584, 609 [10] on the executive as well as the legislature, *Ex parte Endo*, 323 U. S. 283; in war as well as in peace, *Ex parte Milligan*, 4 Wall. 2; *Ex parte Richard Quirin*, 317 U. S. 1, 19.

The doctrine finds support only if one confuses the power to exclude aliens with the power to deport them as was done in the *Fong Yue Ting* case, *supra*. But the cases which upheld the power to exclude aliens without constitutional restrictions of any kind, either substantive or procedural, reached their result by arguing that the Constitution has no extraterritorial application. Cf. *Johnson v. Eisentrager*, 339 U. S. 763. The exclusion cases stand only for the proposition that so long as an alien is outside of the United States, he cannot lay claim to the protection of our constitutional guarantees. *Chae Chan Ping v. United States*, 130 U. S. 581; *United States ex rel Turner v. Williams*, 194 U. S. 279.[11] These are the leading cases

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[10] "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws."

[11] "He [the excluded alien] does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." (at p. 292)

on the absolute power of the government to exclude aliens without regard to any constitutional restrictions. But the opinions in both cases took special pains to point out that the situation before the Court and the resultant constitutional problems bore no relation to those raised by the Alien Law of 1798, which concerned the rights of resident aliens. (*Chae Chin Ping* at pp. 610-611. *Turner at* 294-295).

Thus deportation statutes, unlike exclusion statutes, must be tested against the standards of the Bill of Rights. Since they impose punishment as severe as that imposed by most criminal statutes, they must meet the same tests as criminal statutes. Accordingly, the present statute must fall if it comes in conflict with any of the provisions of the Constitution.

II. The Statute is in Conflict With the Ex Post Facto Clause of the Constitution.

A. The ex post facto clause applies to deportation proceedings.

Three Supreme Court decisions are frequently cited for the proposition that the *ex post facto* clause of the Constitution, Article I, Section 9 has no applicability to deportation proceedings. *Johannessen* v. *United States*, 225 U. S. 227; *Bugajewitz* v. *Adams*, 228 U. S. 585; *Mahler* v. *Eby*, 264 U. S. 32. None of these cases involved an *ex post facto* situation.[12]

The *Johannessen* case, the first in this series, sustained the validity of a statute which authorized the setting aside of a naturalization decree which had been obtained by fraud. The court recognizing that the *ex post facto* clause is not limited to criminal cases, held that the statute before it was not *ex post facto*, since it only took away from the petitioner what he had obtained by fraud in the first place.

In the *Bugajewitz* case, the court held that the particular

[12] For a discussion of these three cases see Note, *In re Harry Bridges*, 52 Yale L. J. 108, 117.

statute involved had no retrospective effect, but nevertheless observed in passing that the *ex post facto* clause had no application to deportation proceedings, erroneously citing the *Johannessen* case in support of that proposition.

In *Mahler* v. *Eby*, the Court in fact reversed orders for deportation on the ground that the Secretary of Labor had failed to make requisite findings that the aliens were presently deportable aliens. But in the course of its opinion the court relying on the *Johannessen* and *Bugajewitz* cases, stated that the *ex post facto* clause does not apply to deportation proceedings because (1) deportation is not punishment and (2) the *ex post facto* clause applies only to criminal statutes.[13]

The erroneous nature of this first assumption of the Court has already been established in our earlier discussion. The second assumption is equally erroneous.

Calder v. *Bull*, 3 Dall 386, which is frequently cited for this proposition, in fact held only that the *ex post facto* clause must be limited in its application to matters which are penal in nature, and that the clause had no application to questions of property rights or contracts (see at p. 390). The criterion for the applicability of the *ex post facto* clause has alway been whether or not the act challenged was penal in nature, not whether or not it was a criminal statute. See *Fletcher* v. *Peck*, 6 Cranch 87, 138; 52 Yale L. J. 108, 116; Cooley, *Constitutional Limitations*, (7th ed. 1903) 375-376.

Cummings v. *Missouri*, 4 Wall. 277; *Ex parte A. H. Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234; and *Burgess* v. *Salmon*, 97 U. S. 381, all hold that the application of the *ex post facto* provision of the Constitution

[13] The Court indicated in the *Mahler* case that it disagreed with the "theory of the draftsman of the petition for the writ and of the assignment of errors . . . that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime" (at pp. 38-39). But the theory of the draftsman has been established as law by the subsequent opinions of this Court. *Jordan* v. *DeGeorge*, supra.

is not limited to strictly criminal proceedings, but that the clause applies to civil proceedings as well if some punishment or penalty is involved. See also, *American Communications Asso.* v. *Douds*, 339 U. S. 382, 413, 414, and *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 720.

And specifically with regard to deportation proceedings, this Court said the following in *Bridges* v. *Wixon*, *supra* at p. 147:

> . . . it must be remembered that although deportation *technically is not criminal punishment* [citing the *Johannessen*, *Bugajewitz* and *Mahler* v. *Eby* cases; *supra*, (emphasis supplied)] it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling [citing *Cummings* v. *Missouri*, and *Ex Parte Garland*, *supra*, both of which involved the application of the *ex post facto* provision of the Constitution].

Thus, the Court clearly indicated that statements in earlier cases that deportation proceedings were not criminal should be construed only in the merest technical sense,[14] but that it did not therefore follow that deportation statutes are exempt from the prohibitions of the *ex post facto* clause. And, of course, this conclusion has been recently reinforced by the doctrine of *Jordan* v. *DeGeorge*, *supra*, that deportation statutes must meet the same test as criminal statutes.

B. The challenged statute is an ex post facto law.

The statute is clearly *ex post facto* as applied to the appellant. It was passed two years after the termination of her membership in the Communist Party. Prior to its passage, the appellant was not subject to deportation.

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[14] Cf. Jackson, J., dissenting in *Jordan* v. *De George*, *supra* at p. 243:

> Deportation proceedings technically are not criminal; but practically they are . . .

After its passage, the appellant could be deported under its terms, despite the absence of any act of commission or omission on her part. Indeed, there was nothing the appellant could do to alter the situation. The order of deportation under the statute rested solely on events that occurred prior to its enactment.[15] The essence of an *ex post facto law* is that it "inflict a punishment for a past act which was not punishable at the time it was committed", see *Cummings* v. *Missouri*, 4 Wall. 277, 319; *Ex parte A. H. Garland*, 4 Wall. 333, 377. Thus in *American Communications Asso.* v. *Douds, supra*, the Court held that the statute there involved was not *ex post facto* because of the

> fact that members of those groups identified in §9(h) [of the Taft-Hartley Act] are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in §9(h) is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand [referring to the *Cummings* and *Garland* cases, *supra*] this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result (at p. 414).

III. The Statute is in Conflict with the First and Fifth Amendments to the Constitution.

The statute under consideration requires the deportation of the appellant upon mere past membership in a proscribed organization, although the proof shows that the appellant never at any time, participated in or had any

[15] The suggestion in *Mahler* v. *Eby, supra*, that a statute permitting deportation solely on the basis of conduct occurring prior to the passage of the statute may be valid should be given little weight, since that statement rested on the erroneous assumptions that deportation proceedings involved no element of punishment and that the *ex post facto* clause applied only to strictly criminal proceedings. See *supra* p. 17.

knowledge of the proscribed activities of that organization. It is abundantly clear that the Constitution, specifically the First and Fifth Amendments, would prohibit the imposition of any criminal penalty upon the appellant under these circumstances.

De Jonge v. *Oregon*, 299 U. S. 353 and *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, are dispositive of the case. The former held that the petitioner could not be punished, under the Constitution, for holding a lawful street meeting, under the auspices of the Communist Party, an organization which was assumed, in that case, to advocate the overthrow of government by force and violence in violation of the laws of Oregon. The *Garner* case in upholding the validity of a loyalty oath for employees of the City of Los Angeles indicated that the statute could not be constitutionally applied to those persons who while affiliated "with a proscribed organization were innocent of its purposes . . ." (p. 723-724).

The doctrine that an individual may be punished in any manner for membership in an allegedly unlawful organization, although he did not share in, participate in, or even have knowledge of, the alleged unlawful activities, has again and again been condemned by this Court. Thus:

> The technique is one of guilt by association—one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims, but we depreciate ourselves by indulging in them. (Douglas, J. concurring in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 178-179).

For similar expressions see *Schneiderman* v. *United States*, 320 U. S. 118;[16] *Bridges* v. *Wixon*, 326 U. S. 135;[17] *Kotteäkos* v. *United States*, 328 U. S. 750.[18] See also Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York, 5 N. Y. Legis. Doc. No. 30, 143rd Sess. p. 4 (1920); O'Brian, *Menace of Administrative Law*, 25 Rep. Md. State Bar Assn, 153, 160-161, 163 (1920); O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, Chaffee, *Free Speech in the United States*, (1948 ed.) 470-484.

The record is clear that the appellant here joined the Communist Party because she understood it to be an organization that was fighting for justice and democracy and the rights of workers, for equal rights for minority races, for better working conditions and wages. She never in any way participated in or had knowledge of any activities of the Communist Party relative to the advocacy of the overthrow of the government by force and violence.

There can be no question that Congress could not, under the Constitution, make this conduct of the appellant criminal after the event. It should be equally clear, under the doctrines of this Court, that Congress cannot inflict the punishment of deportation for this same conduct.

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[16] "... under our traditions beliefs are personal and not a matter of mere association" (at p. 136):

[17] See majority opinion at pp. 147-148 and Murphy, J. concurring at p. 163:

> The deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted . . .
>
> The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. . . . It prevents the persecution of the innocent for the beliefs and actions of others.

[18] "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application" (at p. 772).

Whether tested by the clear and present danger doctrine which applies to First Amendment cases, *Dennis* v. *United States*, 341 U. S. 494; *Terminiello* v. *Chicago*, 337 U. S. 1; *Taylor* v. *Mississippi*, 319 U. S. 583, *Bridges* v. *California*, 314 U. S. 252; *Schenck* v. *United States*, 249 U. S. 47, or the reasonable relation doctrine applicable to indirect restrictions on free speech and to Fifth Amendment cases, *American Communications Asso.* v. *Douds*, 339 U. S. 382; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Tot* v. *United States*, 319 U. S. 463; *Carolene Products* v. *United States*, 323 U. S. 18, the present statute cannot meet the standards set by the Constitution.

Under the circumstances of this case, in view of the character of the appellant's membership and activities in the Communist Party, and since that membership had terminated twelve years prior to the deportation order, it is evident that the appellant's continued presence in this country cannot constitute any clear and present danger of any substantive evil which Congress has a right to prevent.

In fact, her continued presence in this country creates no kind of danger or problem to this country. Nor is there any warrant on the basis of the record here to argue that she is an undesirable alien. Consequently, the order of deportation bears no reasonable relationship to the purpose for which governmental power to deport exists, i. e., to expel undesirable aliens from the country. See *Mahler* v. *Eby*, 264 U. S. 32, 39.

The legislative report accompanying the statute shows that Congress itself gave little or no consideration to the reasonable relation doctrine, acting presumably on the erroneous notion that Congress could do as it will with aliens.[19] Thus the report stated that the bill would require the deportation of "any alien who has been a member . . . [of a proscribed group] at any time after his admission to the United States (for no matter how short a time or

[19] See Murphy, J., concurring in *Bridges* v. *Wixon*, supra, fn. 5.

how far in the past. . .)" H. Rep. No. 2683—Conference Report, 76th Cong., 3rd Sess. at p. 9.[20] And the spokesman for the conferees in the House stated:

> . . . after this bill becomes law, it will be perfectly clear that any alien who has ever been a member of such an organization before coming to this country cannot enter, or if at the time of his entry or at any time thereafter he has been, even for 1 minute, a member of such organization he shall be deported. (86 Cong. Rec. 9032, 76 Cong., 3rd Sess., June 22, 1940).

Obviously, Congress could not reasonably have supposed that an alien who had been a member of the Communist Party for a week or a month or some other short period, and who had terminated such membership ten to fifteen years prior to the enactment of the statute or his eventual deportation was necessarily an undesirable alien. Nor could it reasonably have determined that the circumstances of his joining, his activities in the organization, and his lack of knowledge of the unlawful purposes of the organization, could have no relevance to the question of his deportation. See 52 Yale L. J. 108, 119.

Indeed, the same Congress provided by statute that an alien's membership in a proscribed organization should not constitute a bar to his naturalization if such membership had ceased more than ten years prior to his application. 8 U. S. Code sec. 705 (1942 ed.);[21] *United States* v. *Waskowski*, 158 F (2d) 962. Thus, under our present statutory scheme, the appellant having left the Communist Party twelve years before the order of deportation, was

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[20] Earlier versions of the bill required that the alien, to be subject to deportation, become a member of the proscribed group "knowingly and voluntarily." S. Rep. 1154, 76th Cong; 1st Sess. at p. 5; H. Rep. 994, 76th Cong. 1st Sess. at p. 6. But even this qualification was eliminated from the final version of the bill.

[21] The same provision was retained in the recent amendments provided by the International Security Act of 1950. 8 U. S. Code sec. 705 (c).

eligible for naturalization at the time she was ordered deported.

Nor was it permissible for Congress to provide a conclusive presumption that any alien who had been a member of a proscribed organization "for no matter how short a time or how far in the past" was necessarily an undesirable alien without regard to the alien's own beliefs, activities, or knowledge of the purposes of the organization. Cf. *Bailey* v. *Alabama*, 219 U. S. 219; *Tot* v. *United States*, 319 U. S. 463.

Indeed in a period even subsequent to the time when the appellant ceased to be a member of the Communist Party, courts, public officials, and writers found great difficulty in determining the character of that organization, even after careful study of the literature of the Communist Party, a study that the appellant here never engaged in. *Schneiderman* v. *United States*, 320 U. S. 118;[22] *Strecker* v. *Kessler*, 95 F (2d) 976; Note, 52 Yale L. J. 108, 114,[23] 128;[24] Chafee, *Free Speech in the United States*, supra 223, 476-478, 481.[25] Obviously, under these circumstances, Congress could not establish a conclusive presumption that the

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[22] "With commendable candor, the government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some Communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal' " (at p. 148).

[23] "Moreover, the difficulty of a member's achieving actual knowledge of the aims of an organization is illustrated by testimony of two of the government witnesses [in the Bridges case] that they were members of the Communist Party for several years before unearthing its allegedly basic purpose—the use of force and violence."

[24] "The question is not easy to answer. Courts have struggled with the question for years."

[25] The "question . . . has puzzled men of high intelligence ever since the Deportation Act of 1918. United States Circuit Judges and Cabinet officers could not agree about it in 1920. We have had two decades since then in which to make up our minds, and the problem is still unsolved."

appellant knew and shared in the alleged unlawful purposes of the Communist Party.

Nor can one rationally presume the undesirable character of the appellant on the basis of her past connection with the Communist Party when the record shows that the appellant never even read the documents, which, in the government's view, establish the unlawful nature of the Communist Party. To do so would be to reach conclusions as to the character of the appellant on the basis of books and documents of which she herself had no knowledge. Cf. *Herndon* v. *Lowry*, 301 U. S. 242, 260.

Nor can any merit be conceded to the suggestion of the Court in *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F (2d) 137 that the statute provides "a workable rule which avoids the administrative difficulties of making a separation between those who do and those who do not favor the illegal objective of the group" (at p. 142). But no mere rule of convenience can justify so drastic a punishment as this Court has held deportation to be. *Cf. Tot* v. *United States, supra.* The suggestion involves nothing more than a blunt proposal that the government punish all within a given group, some of whom may be guilty and some not, in order to avoid the "administrative difficulties" of determining guilt or innocence. But the alternative of granting each person a hearing and determining each case on its own merits is the only method consonant with our tradition and the constitutional requirement of due process of law. Nothing less than this full measure of constitutional process is required in deportation proceedings. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-50.

IV. The Proceeding Failed to Conform With the Requirements of the Administrative Procedure Act and Denied the Appellant Due Process of Law.

The government, below, conceded that the deportation proceeding failed to conform with the requirements of the Administrative Procedure Act, 5 U. S. Code sec. 1001 et

seq. Nor did it dispute that this Act was applicable to deportation proceedings as of the date when the hearings in this case were held. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

The government argued however that the case is governed by section 12 of the Administrative Procedure Act, 5 U. S. Code sec. 1011 which provides that "no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." But this section does not apply to the present proceeding which was initiated after the effective date of the Act.

The purpose of section 12 of the Administrative Procedure Act, according to the report of the Senate Judiciary Committee, was to postpone the effective date of the Act "for periods of time sufficient to afford agencies ample opportunity to revise their practices as required." Senate Document No. 248, 79th Cong., 2d Sess. p. 43.

The government argued, below, that although the hearings in this case were not held until July 26 and 27, 1949, some three years after the Administrative Procedure Act was enacted, the proceeding was nevertheless initiated by a warrant of arrest issued on April 12, 1946, and served on May 10, 1946, more than three years before the hearing. But it is obvious that the provisions of section 12 are not open to such a construction.

The word "proceeding" is not a technical term of art. The courts have said that it is to be interpreted in accordance with the context and the purpose of the statute in which it is employed. *Hale* v. *Henkel*, 201 U. S. 43, 66; *Bowers* v. *New York and A. Lighterage Co.*, 273 U. S. 346; *United States* v. *Day*, 20 F (2d) 733; *Raftery* v. *Tillinghast*, 63 F (2d) 97.

In its context, section 12 was clearly meant to cover only proceedings either already under way or at least scheduled for hearing at the time of the Act; so that the provisions of the Act would not result in interrupting or delaying proceedings already begun. But it is obvious in this case that the Immigration Service had ample time

to conform to the procedure of the Act in the three years intervening between the passage of the Act and the date the hearings were held.

Further, it is perfectly evident that section 12 and the need for time to revise its practices had nothing to do with the failure of the Immigration Service to conform with the Administrative Procedure Act. The failure to conform was based solely on the ground that the Administrative Procedure Act did not apply to the Immigration Service, and not on the ground that the Service had not as yet had opportunity to change its practices. (R. 8, 9) The subsequent reliance on section 12 was at best an afterthought, necessitated by this Court's decision, subsequent to the hearing, rejecting the Immigration Service's contention that it was exempt from the Act. *Wong Yang Sung* v. *McGrath, supra* (R. 16-17). Further, when the Service finally bowed to this Court's decision in the *Wong Yang Sung* case, it issued regulations to make all its future hearings conform with the Administrative Procedure Act, making no distinction between cases where the warrant of arrest was issued before the effective date of the Act, and cases where the warrant of arrest was issued after the effective date. 15 Fed. Reg. 1298-1302. *Yanish* v. *Barber*, 181 F (2d) 492.

Even in a technical sense, it is difficult to understand how the present proceeding can be considered to have been initiated prior to the effective date of the Act, when it is realized that the findings upon which the deportation order rests were not made upon the basis of the charges lodged in the warrant of arrest, but on the basis of charges lodged only on the second day of the hearing (R. 9, 19).

Furthermore, the failure to conform with the requirements of the Administrative Procedure Act amounted to a denial of a fair hearing, and a deprivation of due process of law. See *Wong Yang Sung* v. *McGrath*, supra, where the Court said at pp. 50-51:

> Indeed, to so construe the Immigration Act [so that the Administrative Procedure Act did not apply to

proceedings thereunder] might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed with direction to that court to grant the appellant the relief prayed for in her complaint.

Respectfully submitted,

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